Under Ohio Law, a Defendant is required to file an application for wrongful imprisonment, for state law issues, and the trial judge must find wrongful imprisonment (innocence, if one reads the criteria, a judge must consider before the judge issues such certificate - that the person cannot be guilty of even one charge related to the action, nor any lesser included offenses (O.R.C. Section 2743.48(A) through (H), before a judge can permit a defendant to be compensated by the State of Ohio. It would then odd if under Federal Law, related to the filing of a 42 U.S.C. Section 1983 Action, in Ohio, that a defendant would not be required to demonstrate some form of wrongful imprisonment prior to litigating his Fourth Amendment issues, and permit him to sue simply based on any form of *nolle prosequi*.

This Court has found that a malicious prosecution claim is a Fourth Amendment issue, related to *wrongful imprisonment* in Thacker v. City of Columbus, 328 F. 3d 244, 258 (6th Cir. 2003). Wrongful imprisonment must mean more than a *nolle prosequi,* or it permits any person, regardless of the facts of their case, to file a federal lawsuit, if the *nolle prosequi* is entered for any reason whatsoever. To allow a person, who received a technical reversal, when guilt was firmly established, would open the floodgates to litigation against state officials regardless of guilt or innocence.

As the cases cited above, and reasonableness fully demonstrate, the accrual date must begin, in Ohio, only

after Ohio law is followed, that is, a finding by the Trial Court that the person was wrongfully imprisoned, or to hold otherwise ignores Ohio law which does not permit the *nolle prosequi* to be the sole deciding factor of whether a person was wrongfully imprisoned and permitted to be compensated. It would simply fly in the face of the Ohio Legislature who set up the specific terms of wrongful imprisonment in Ohio.

In addition, the accrual date on this issue, as decided by the other Federal Appellate Courts, have all found that innocence is to be factored in, and not the entry of the *nolle prosequi,* in and of itself, as the sole determinative factor.

2. Whether the exceptions found in Donahue v. Gavin, 280 F. 3D 371, 384 (3RD CIR 2002); Washington v. Summerville,127 F. 3D 552, 558-59 *(7TH CIR. 1977), demonstrate that some finding of innocence is required and the nolle prosequi standing alone is insufficient to start the federal accrual date.*

Although the panel stated that the statute of limitation started when the nolle prosequi was entered in October 11, 2000, the panel failed to address the main issues of the case, which is, when a nolle prosequi is issued stating that the "witness no longer was willing to testify", does not constitute a favorable ruling, allowing a person to sue for Fourth Amendment violations. If so, it provides that anyone who receives a nolle, regardless of the reason

for its issuance, can sue under 42 U.S.C. Section 1983, which are contrary to two sister courts.

Although federal courts use the statute of limitations in 1983 actions from state courts, the accrual date is purely a matter of federal law, and the panel completely missed the argument.

The importance of this issues is self-evident, it now provides that prisoner who receives a nolle can sue under 42 U.S.C. Section 1983, regardless of guilt or innocence, and ignores the basic premise of the Sixth Circuit Court's en banc decision in Dotson vs. Wilkinson ELECTRONIC CITATION: 2003 FED App. 0147P (6th Cir.), Case No. 03-287. Although Dotson did not address this issue head-on, it did provide guidance, as the Sixth Circuit stated: "The Court sought to further clarify the question, however. Citing the Preiser v. Rodriguez, 411 U.S. 475 (1973), quote above, that seeking damages is not challenging one's confinement, the Supreme Court said, "That statement may not be true, however, when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction." Id. at 481. The Supreme Court went on to limit the use of section 1983 for prisoner claims, stating at 486-87, that in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such

determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. We hold that procedural challenges to parole eligibility and parole suitability determinations such as those made by Dotson and Johnson do not necessarily imply the invalidity of the prisoners conviction or sentence and, therefore, may appropriately be brought as civil rights actions, under 42 U.S.C. § 1983, rather than pursuant to an application for habeas corpus."

This Honorable Court on March 7, 2005, affirmed this Court's decision, stating. "(t)hroughout the legal journey from Preiser v. Rodriguez, 411 U.S. 475 (1973) to Edwards v. Balisok, 520 U.S. 641 (1997), the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of the State's custody. Thus, Preiser found an implied exception to §1983's coverage where the claim seeks—not where it simply "relates to"—"core" habeas corpus relief, i.e., where a state prisoner requests present or future release. Cf. post, at 5 (Kennedy, J., dissenting) (arguing that Preiser covers challenges that "relate ... to" the duration of confinement). Wolff makes clear that §1983 remains available for procedural challenges where success in the action would not

necessarily spell immediate or speedier release for the prisoner. Heck specifies that a prisoner cannot use §1983 to obtain damages where success would necessarily imply the unlawfulness of a (not previously invalidated) conviction or sentence. In addition, Balisok, like Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974), demonstrates that habeas remedies do not displace §1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement. These cases, taken together, indicate that a state prisoner's §1983 action is barred (absent prior invalidation)--no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)--if success in that action would necessarily demonstrate the invalidity of confinement or its duration."

Section 1983. Civil action for deprivation of rights:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Heck v. Humphrey, 512 U.S. 477 (1994), provided that:

"In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. 2254. A claim for damages bearing that relationship to a conviction or sentence that has

not been so invalidated is not cognizable under 1983. Preiser v. Rodriguez, 411 U.S. 475, 494, and Wolff v. McDonnell, 418 U.S. 539, 554, distinguished. The foregoing conclusion follows upon recognition that the common law of torts provides the appropriate Page II starting point for the 1983 inquiry, see Carey v. Piphus, 435 U.S. 247, 257-258; that the tort of malicious prosecution, which provides the closest analogy to claims of the type considered here, requires the allegation and proof of termination of the prior criminal proceeding in favor of the accused, see, e.g., Carpenter v. Nutter, 59 P. 301; and that this Court has long been concerned that judgments be final and consistent, and has been disinclined to expand opportunities for collateral attack on criminal convictions, see, e.g. ... Although the issue in cases such as this is not, therefore, the exhaustion of state remedies, the dismissal of Heck's 1983 action was correct because both courts below found that his damages claims challenged the legality of his conviction. Pp. 3-14."

In Albright v. Oliver, et al., 510 U. S. 266, at 280 (1994) Ginsburg, J., concurring stated: "(t)he time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, i.e., upon dismissal of the criminal charges against Albright. See McCune v. Grand

Rapids, 842 F. 2d 903, 908 (CA 6 1988) (Guy, J., concurring in result) ("Where . . . innocence is what makes the state action wrongful, it makes little sense to require a federal suit to be filed until innocence or its equivalent is established by the termination of the state procedures in a manner favorable to the state criminal defendant.").

The question before this Honorable Court would be does a nolle in and of itself start the federal accrual date. Petitioners assert that it does not and cannot. Two Sixth Circuit sister courts agreed with Petitioners' proposition, and no other Federal Circuit Court has ruled on the issue.

There is a narrow exception to the rule when dismissal of the charges does not indicate the defendant's innocence but is the result of the impossibility or impracticability of bringing the defendant to trial. Dismissal based on other reasons, which would mean, for example that a defendant would serve no more time (not based upon innocence), see Donahue v. Gavin, 280 F.3d 371, 384 (3rd Cir 2002), and Washington v. Summerville, 127 F.3d 552, 558-59 (7th Cir. 1977), (not a favorable termination), should apply to this case.

In the case at bar, the termination was not favorable, in that it stated the reason for the nolle was simply that the witnesses did not want to testify. That does not rise to the level of a finding that anyone would consider favorable, or that the Petitioner (Franklin Wilmoth) was innocent.

Where the prosecution did not result in an acquittal, it is deemed to have ended in favor of the accused, for these

purposes, only when its final disposition is such as to indicate the innocence of the accused. See, e.g., Restatement §660 commenta; Halberstadt v. New York Life Insurance Co., 194 N.Y. 1, 10-11, 86 N.E. 801, 803-04 (1909) ("Halberstadt"); Hollender v. Trump Village Cooperative, Inc., 58 N.Y.2d 420, 426, 461 N.Y.S.2d 765, 768 (1983) ("Hollender") (quoting Restatement §660 commenta); MacFawn v. Kresler, 88 N.Y.2d 859, 860, 644 N.Y.S.2d 486, 486 (1996) (mem.) (whether "the final disposition of the proceeding involves the merits and indicates the accused's innocence" (citing Hollender)); O'Brien v. Alexander, 101 F.3d 1479, 1486-87 (2d Cir. 1996) (discussing cases); Russell v. Smith, 68 F.3d at 36 ("In the absence of a decision on the merits, the Petitioner must show that the final disposition is indicative of innocence."). The answer to whether the termination is indicative of innocence depends on the nature and circumstances of the termination. Courts have further reasoned, "only terminations that indicate that the accused is innocent ought to be considered favorable." Hilfirty, 91 F.3d at 580 (relying on Restatement (Second) of Torts § 660 cmt. a ("Proceedings are "terminated in favor of the accused' ... only when their final disposition is such as to indicate the innocence of the accused.")); Taylor v. Gregg, 36 F.3d 453, 456 (5th Cir.1994) (per curiam) (same); Singleton v. City of New York, 632 F.2d 185, 193 (2nd Cir.1980).

IV. IN CONCLUSION:

WHEREFORE, the Petitioners move for this Honorable Court to issue a Writ for Certiorari, based upon the panel's decision being in conflict with the other sister appellate courts, and to provide guidance to the lower Federal District Courts on this issue. As Judge Gwin stated in his order, there is no U.S. Supreme or Sixth Circuit guidance on this issue.

Respectfully submitted,

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APPENDIXES:

APPENDIX A

No. 04-3645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANKLIN D. WILMOTH, ET AL., Filed July 29, 2005
Plaintiffs-Appellants, Leonard Green, Clerk
v. ORDER
PORTAGE COUNTY, OHIO, ET AL.,
Defendants-Appellees.

BEFORE: COLE and SUTTON, Circuit Judges; and
ZATKOFF,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

S/LEONARD GREEN
LEONARD GREEN, CLERK

*Hon Lawrence P. Zatkoff, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX B

Case 5:03-CV-02462-JG Document 49
Filed *05/02/200*
5 page 1 **FILED APR 28, 2005**
No. 04-3645
LEONARD GREEN,CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANKLIN WILMOTH;
MARY WILMOTH,
Plaintiff-Appellants,
vs.

PORTAGE COUNTY, OHIO; BRIMFIELD POLICE DEPARTMENT; PORTAGE COUNTY BOARD OF MENTAL HEALTH AND RETARDATION; DAVID WALTERS; JOHN RICHARDS BOB BURGESS; DESKO, PATROLMAN, BRIMFIELD POLICE DEPARTMENT; PATTY UYSK, SLC, BRIMFIELD TOWNSHIP; JUDY FETTEROFF; FEDEROFF; MING LAI,
Defendants-Appellants,

*Before: COLE and SUTTON, Circuit Judges: ZATKOFF, District Judge

Franklin and Mary Wilmoth appeal a district court judgment dismissing their complaint filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 34(j) (1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R . App . P. 34 (a).

Seeking monetary damages, the Plaintiffs sued Portage County (Ohio), the county's Board of Mental Retardation, and the Board's then-employees John Richards, David Walters, Patty Uyek (set forth as Uysk on this Court's docket sheet), Judy Fetteroff, and Ming Lai. The Petitioners also sued Brimfield Township, Brimfield Township Police Department, Patrolman Desko, and Captain Bob Burgess. The individual Defendants were sued in their official and individual capacities.

Plaintiffs were contract care providers for mentally retarded patients. Franklin Wilmoth's conduct was investigated with respect to that employment, and in 1994 he was found guilty of gross sexual imposition and patient abuse in violation of Ohio Rev. Code § 2907.05(A)(1) & (B) and 2903.34(A)(2) & (D). Wilmoth served eighteen months in prison until his conviction

was reversed on direct appeal. On October 5, 2000, the charges against Wilmoth were dismissed by nolle prosequi. The trial court approved the nolle prosequi on October 11, 2000. The immediate complaint arose from the prosecution of Franklin Wilmoth. Plaintiffs alleged that Respondents violated their constitutional rights by maliciously prosecuting Franklin Wilmoth for multiple counts of gross sexual imposition, rape, felonious sexual penetration, assault, and patient abuse.

The district court dismissed Plaintiffs' complaint as barred by the applicable statute of limitations. Thereafter, the district court denied Petitioners' motion to reconsider.

In their timely appeal, Plaintiffs reassert the claims set forth in the district court. They contend that the district court improperly relied on state law to decide the accrual date for their action.

Generally, we review a district court judgment granting a motion to dismiss based on a statute of limitations de novo. Tolbert v. Ohio Dep't of Transp., 172 F.3d 934, 938 (6th Cir. 1999).

Upon review, we conclude that the district court properly dismissed Plaintiff's complaint as time-barred. The federal courts apply state personal injury statutes of limitations to claims brought under 42 U.S.C. § 1983. Wilson v. Garcia, 471 U.S. 261, 276 (1985). The appropriate statute of limitations in Ohio is two years. Ohio

Rev. Code § 2305.10; Kuhnle Bros. v. County of Geauga, 103 F.3d *516,* 519 (6th Cir. 1997).

The statute of limitations on a malicious prosecution claim begins to run upon the termination of the antecedent criminal proceedings. Heck v. Humphrey, 512 U.S. 477, 489-90 (1994); Dunn v. Tennessee, 697 F.2d 121, 127(6th Cir. 1982). The criminal proceedings in Franklin Wilmoth's case were terminated in his favor on October *5,* 2000, the date on which the prosecutor filed a notice of nolle prosequi. *See* White v. Rockafellow, No. 98-1242, 1999 WL 283905 (6th Cir. Apr. 27, 1999). Therefore, Petitioners had two years from that date, *i.e.,* until October 5, 2002, in which to file a § 1983 complaint. The Plaintiffs filed their complaint on December 2, 2003. Thus, the complaint was not filed within two years and is untimely.

The Plaintiffs' argument to the contrary lacks support. Petitioners contend that their § 1983 action could not have been brought until after a state law civil proceeding for wrongful incarceration, from which Franklin Wilmoth was awarded $111,934.20 for his wrongful imprisonment pursuant to Ohio Rev. Code § 2743.48. Plaintiffs cite no authority for the proposition that a § 1983 claim cannot be brought for a malicious prosecution until there is a state-law finding of wrongful incarceration.

Accordingly, we affirm the district court's judgment pursuant to Rule 34(2) (C), Rules of the Sixth Circuit.*

ENTERED BY ORDER OF THE COURT

S/LEONARD GREEN

Clerk

The Honorable Lawrence P. Zatkofl', United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX C

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Filed 03/31/2004
Page 1 of 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

FRANKLIN WILMOTH, et al.,
Plaintiffs,

CASE NO. 5:03-C V-2462
ORDER

vs

PORTAGE COUNTY, OHIO, et al.,
Defendants

JAMES S.GWIN,
UNITED STATES DISTRICT JUDGE:

Pending before the Court are Defendants' Portage County Board of Mental Retardation and its then-employees John Richards, David Walters, Patty Uyek, Judy Fetteroff, and Ming Lai's motion to dismiss [Doc. No. 17] and Defendants' Brimfield Township, Brimfield Police

Department, Patrolmen Desko, and Captain Bob Burgess's motion to dismiss [Doc. No. 33], to which Plaintiff's have responded [Doc. Nos. 22, 34]. For the reasons discussed in the accompanying memorandum opinion, the Defendants motions are GRANTED.

IT IS SO ORDERED.

Dated: March 31, 2004

s/ ***James S. Gwin***

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX D

Case 5:03-CV-02462-JG Document 35
Filed 03/31/2004
Page 1 of 10

UNTTED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

FRANKLIN WILMOTH, et al.,
Plaintiffs,

CASE NO. 5:03-C V-2462

vs

OPINION
[Resolving Doe. Nos. 17, 33]

PORTAGE COUNTY, OHIO, et al.,
Defendants

JAMES S. GWIN,
UNITED STATES DISTRICT JUDGE:

Pursuant to a contract with the Portage County Board of Mental Retardation, Plaintiffs, Franklin and Mary Wilmoth, provided residential care to adults with mental

retardation. Plaintiffs claim that Defendants, Portage County, Ohio, Brimfield Police Department, Portage County Board of Mental Retardation, and various individual employees of these agencies, violated Plaintiffs constitutional rights when investigating allegations that Franklin Wilmoth had raped certain residents under their care. Because of Defendants' actions, Plaintiffs assert that Franklin Wilmoth was wrongfully prosecuted, convicted, and imprisoned. Plaintiffs now seek damages to compensate them for their lost employment; reputation, and property.

On February 4, 2004 Defendants, Portage County Board of Mental Retardation and its then-employees John Richards, David Walters, Patty Uyek, Judy Fetteroff, and Ming Lai, Ph.D., moved for a dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). On March 16, 2004, Brimfield Township, Brimfield Township Police Department, Patrolmen Desko, and Captain Bob Burgess also moved to dismiss the complaint. These Defendants assert that the applicable statute of limitations bars the complaint. Plaintiffs oppose the motions.

For the following reasons, the Court finds that Plaintiffs' complaint is barred by the applicable statute of limitations and GRANTS Defendants' motion.

Gwin, J.

I. BACKGROUND

For purposes of this motion to dismiss, the Court accepts the Plaintiffs' version of the facts. Beginning in 1989, Plaintiffs Mary Wilmoth and Franklin Wilmoth provided residential services for adults with mental retardation. The Portage County Board of Mental Retardation oversaw the care provided in the Wilmoth's home.

In 1993, one of the residents reported that Franklin Wilmoth had intercourse with her. The Portage County Board of Mental Retardation subsequently removed all of the residents from the Wilmoth's home. The Board of Mental Retardation and the Brimfield police investigated the alleged rape. Plaintiffs contend that the investigators asked leading questions and coached the residents to state that Franklin Wilmoth had raped and sexually abused them. Because of these inappropriate investigatory techniques, several prior residents falsely reported that Franklin Wilmoth had also engaged in sexual conduct with them. Based solely on these reports, Portage County charged Wilmoth with multiple counts of gross sexual imposition, rape, felonious sexual penetration, assault, and patient abuse.

On April 13, 1994, Franklin Wilmoth was found guilty of one count of patient abuse and two counts of gross sexual imposition and sentenced to a three-year

term of incarceration.1.

[1]The court acquitted Plaintiff Wilmoth of eight other charges, including two counts of rapes.
Franklin Wilmoth appealed his conviction. On June 12, 1995, the appellate court reversed Wilmoth's conviction and remanded the case for a new trial due to evidentiary error. Franklin Wilmoth was released from prison pending the second trial. For the next five years, Franklin Wilmoth remained under indictment. Then on October 5, 2000, the prosecutor nollied the prosecution, asking the trial court to dismiss the indictment.

Gwin, J.

In explaining his decision to seek dismissal, the prosecutor said "that the victim no longer wishes to cooperate or proceed with the case." The trial court approved the *nolle prosequi* on October 11, 2000.

After the dismissal of the charges, Plaintiff Wilmoth sought a certificate of wrongful incarceration in state court. On January 8, 2002, the Ohio Common Pleas Court found that Plaintiff Wilmoth had been wrongfully convicted and

incarcerated and issued the certificate. On December 3, 2003, Plaintiffs filed the instant civil action pursuant to 42 U.S.C. § 1983. Plaintiffs also brought pendant state law claims. Defendants now ask the Court to dismiss the action because it is barred by the statute of limitations.

II. LEGAL STANDARD:

When analyzing a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b.6), a court must decide whether the moving defendant has shown that the plaintiff can prove no set of facts entitling the plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46(1957). A court will dismiss a complaint for failure to state a claim "only Wit is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69(1984). In making this determination, a court "must construe the complaint in the light most favorable to the plaintiff, accept all of the complaints factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." Ziegler v. IGP Hog Market, Inc., 249 F.3d 509, 512 (6th Cir. 2001).

III. DISCUSSION:

Defendants' motions miss the strictly legal issue of when Plaintiffs' cause of action accrued. With their complaint, Plaintiffs allege constitutional violations under 42 U.S.C. § 1983. Actions brought under § 1983 apply the statute of limitations from a state's general personal injury statute. Owens v. Okure, 488 U.S. 235, 249-590 (1989); Trzebuckowski v. City of Cleveland, 319 F.3d 853, 855 (6th Cir. 2003). Ohio law provides a two-year statute of limitations for personal injury actions. See Browning v. Pendleton, 869 F.2d 989,990(6th Cir. 1989) (finding a two-year statute of limitations is appropriate for § 1983 claims brought in Ohio). Thus, if Plaintiffs cause of action accrued before December 3, 2001, Plaintiffs suit is untimely and must be dismissed.

In § 1983 claims, the statute of limitations begins to run when the plaintiff knows or has reason to know of the injury that is the basis of his action. Ruff v. Runyon, 258 F.3d 498, 500 (6th Cir. 2001). This inquiry focuses on when the harm incurred, not on when the plaintiff had knowledge of the underlying facts leading to the harm. *Id.* at 501. In making this determination, a court looks to the event that should have alerted the typical lay person to protect his or her rights. Trzebuckowski, 319 F.3d at 856.

Attempting to aid the Court in determining when Plaintiffs' cause of action accrued, the parties offer four different dates. In their initial motion to dismiss, Defendants Board of Mental Retardation and their employees eagerly suggest that Plaintiff Wilmoth knew he was being maliciously prosecuted in violation of his constitutional rights in April 1994, the date of his trial and conviction. Plaintiffs respond that their cause of action did not accrue until the trial court issued the certificate of wrongful incarceration on January 8, 2002, apparently

The Court reads Plaintiffs' complaint as asserting only constitutional claims pursuant to 42 U.S.C. § 1983. In their detailed complaint, Plaintiffs clearly state that all of their claims arise under that federal statute. Moreover, the complaint's jurisdictional section states that the court has jurisdiction under 28 U.S.C. § 1331 and 1343(a). The complaint does not plead supplemental jurisdiction over any state law claims.

Conceding the wrongness of their original date,

Defendants suggest two additional options: either the date the appellate court reversed the conviction or the date the court entered the nolle prosequi dismissing the charges. The Court considers each date and concludes that Plaintiffs' cause of action accrued upon dismissal of the charges against Plaintiff Wilmoth.

A. The date of conviction:

Defendants Board of Mental Retardation and its employees suggest that Plaintiff Wilmoth was aware at the time he was tried and convicted of the constitutional violations that give rise to his § 1983 claims. Unfortunately for Defendants, United States Supreme Court precedence makes clear that the statute of limitations for Plaintiffs' claims does not start to run at that point.

In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court held that 42 U.S.C. § 1983 does not provide a cause of action for an allegedly unconstitutional conviction, imprisonment, or other harms where recovery would necessarily imply the invalidity of a verdict in an underlying criminal proceeding. In such an instance, a § 1983 action only starts accruing when a plaintiff has a favorable termination of the criminal proceeding. Id. at 489 ("Under our analysis the statute of limitations poses no difficulty while the state challenges are being pursued, since the § 1983 claim has not yet arisen.").

Plaintiffs' complaint raises a federal claim of

malicious prosecution under the Fourth Amendment. Plaintiffs allege that Defendants wrongfully investigated Franklin Wilmoth, thereby leading to his wrongful prosecution, conviction, and incarceration. See Thacker v. City of Columbus, 328 F.3d 244, 258 (6th Cir. 2003) (concluding that the Fourth Amendment supports malicious prosecution claim in § 1983 actions). The Court considers whether success on Plaintiff's federal malicious prosecution claim would necessarily have implied the invalidity of his conviction on the underlying criminal charges.

To recover on a federal malicious prosecution claim, a plaintiff is required to prove, among other things, a favorable termination of the criminal proceeding. See, e. g., Heck, 114 S. Ct. 2371 (noting that termination of criminal proceedings in favor of the accused is a necessary element of common law malicious prosecution claim); Smith v. Wambaugh, 87 F.3d 108, 111 (3d Cir. 1996) (same for § 1983 malicious prosecution action); Washington v. Summerville, 127 F.3d 552, 558-59(7thCir. 1997) (same for § 1983 malicious prosecution action); Trussell v. Gen.

Motors Corp., 559 N.E.2d 732, syllabus (1990) (same under Ohio law). Thus, Plaintiffs' federal malicious prosecution claim necessarily implies that Franklin Wilmoth's conviction for gross sexual imposition and patient abuse were invalid. Under the rationale of Heck, the claims were not cognizable until Wilmoth secured a favorable termination of the criminal proceeding.

B. The date of reversal and remand for a new trial

Following the dates chronologically, the Court next considers whether Plaintiffs' cause of action accrued on June 12, 1995, when the appellate court reversed the trial court's conviction and remanded for a new trial. Two months later, Plaintiff Wilmoth was released from prison to await the second trial.

The Court concludes that Plaintiffs cause of action did not accrue at this time. Although the Supreme Court has not directly addressed this issue, the Sixth Circuit holds that a cause of action under § 1983 that would impugn the validity of a future criminal conviction will not accrue "until the disposition of any pending criminal charges." Ruff, 258 F.3d at 502 (citing Shamaeizadeh, 182 F.3d at 396).

Although Plaintiff Wilmoth's conviction had been reversed, he was still the subject of an ongoing

prosecution. The indictment had not been dismissed. Because the criminal prosecution had not reached a final disposition, Plaintiffs cause of action had not accrued. See id. Since the potential for a judgment in the pending criminal prosecution continued to exist, the Plaintiffs lacked a cognizable § 1983 claim under Heck. See id.

This conclusion is not altered by Plaintiff Wilmoth's release from prison two months after the appellate court's reversal. The Sixth Circuit has observed that the statute of limitations for claims of malicious prosecution does not begin to run until the charges are dismissed, whether or nor the individual remains incarcerated. Id. at 503.

C. The date of dismissal of the prosecution through the nolle prosequi.

Defendants next assert that Plaintiffs' cause of action accrued, at the latest, when the charges were dismissed pursuant to a nolle prosequi. Since the trial court entered the nolle prosequi in October of 2000, more than two years before Plaintiffs filed their complaint;

Defendants contend that the Plaintiffs' complaint is time-barred.

The entry of the nolle prosequi was a final disposition of the criminal prosecution against Plaintiff Wilmoth. Thus, the rationale of Heck does not preclude the court from finding that the date of entry of the nolle prosequi started the statute of limitations running. See Smith v. Holtz, 87 F.3d at 114 (holding that

Heck only requires dismissal of charges and not a finding of actual innocence before plaintiff may bring § 1983 claim).

Even if the dismissal of the charges was a termination, Plaintiffs argue that it was not a favorable termination that would support a malicious prosecution claim. Plaintiffs contend that they were not alerted that they had a federal malicious prosecution claim until Wilmoth received a certificate of wrongful incarceration.

Courts generally hold that entry of a nolle prosequi

without the procurement or consent of a defendant is a favorable termination of a criminal proceeding for purposes of a malicious prosecution claim. See 52 AM JUR 3D Malicious Prosecution § 35. A narrow exception to this rule exists when the dismissal of the charges does not indicate the defendant's innocent but is the result of the impossibility or impracticability of bringing the defendant to trial RESTATEMENT (SECOND) OF TORTS § 661 (1977); see also Donahue v. Gavin, 280 F.3d 371,384 (3d Cir. 2002) (concluding that plaintiff had no § 1983 malicious prosecution claim when nolle prosequi was filed primarily because change in laws meant that upon retrial individual would not have received additional jail time); Washington v. Summerville, 127 F.3d 552, 558-59 (7th Cir. 1997) (holding plaintiff had no claim under § 1983 for malicious prosecution when nolle prosequi gave no reason for dismissal and therefore was not a favorable termination).

Here, the dismissal of the charges resulted from the complaining witness's refusal to testify. Neither the parties, nor the Court, finds any federal case law deciding whether this constitutes a favorable termination for purposes of a malicious prosecution claim. However, state courts addressing this issue have consistently concluded that a dismissal of charges based on the complaining witness's refusal to testify is a favorable termination supporting a malicious prosecution claim. Cox v. Williams, 593 N.W.2d 173, 175 (Mich. App. 1999), a Michigan appellate court concluded that a prosecutor's dismissal of criminal sexual

conduct charges due to the complaining witness's refusal to testify was a favorable termination that could support a malicious prosecution claim. The Cox court observed that other state courts addressing the issue had similarly concluded. Id.

In Loeb v. Teitelbaum, 432 N.Y.S.2d 487, 493 (1980), modified on other grounds, 439 N.Y.S.2d 300 (1981), the New York Supreme Court Appellate Division found that dismissal of charges based on the prosecutor's failure to procure the testimony of two police officer witnesses implied a lack of reasonable grounds for prosecution. Thus, the court concluded that the action terminated favorably for malicious prosecution purposes.

Similarly, in an unpublished opinion, a California appellate court concluded that dismissal of a stepdaughter's childhood sexual abuse action against her former stepmother due to the stepdaughter's failure to appear at trial satisfied the favorable termination element of the stepmother's malicious prosecution claim Hermann v. Steinberg, 2002 WL 31868109 *8 (Cal. App. Dec. 24, 2002).

The Restatement (Second) of Torts supports the reasoning of these state court cases. Section 65 9(c) states that criminal proceedings are terminated in favor of the accused by "the formal abandonment of the proceedings by the public prosecutor." RESTATEMENT (SECOND) OF TORTS § 659(c) (1977). The establishment of actual innocence is not necessary to show a favorable termination for malicious prosecution purposes.

When the prosecution dismissed the charges against Plaintiff Wilmoth, the proceedings had terminated in ha favor. At this time, Plaintiffs were alerted to the fact that they had a potential claim under § 1983. The statute of limitations on their cause of action accrued at this time.

V. CONCLUSION:

Since Plaintiffs' cause of action against the Defendants accrued when the charges were dismissed in October 2000, the Plaintiffs' complaint is untimely. Therefore, the Court GRANTS Defendants' motion to dismiss. The Court dismisses the Plaintiffs' complaint against all Defendants named in the complaint.

IT IS SO ORDERED.
Dated: March 31, 2004
s/ *James S. Gwin*

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO

FRANKLIN D. WILMOTH. et al.,
Plaintiffs, CASE NO. 5:03-C V-2462
vs. OPINION ORDER
PORTAGE COUNTY, OHIO et al.,
[Resolving Doc. No. 38]

Defendants
JAMES S. GWIN,
UNITED STATES DISTRICT JUDGE:

On March 31, 2004, the Court dismissed Plaintiffs' complaint as barred by the applicable statute of limitations. [Doe. 36]. On April 5, 2004, Plaintiffs moved for reconsideration and/or clarification of the Court's order. [Doe. 38]. Because the Plaintiffs have not shown adequate reason for the Court to alter or amend its judgment, the Court DENIES Plaintiffs' motion.

1. BACKGROUND

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983. Plaintiffs alleged that Defendants violated their constitutional rights by maliciously prosecuting Plaintiff Franklin Wilmoth for multiple counts of gross sexual imposition, rape, felonious sexual penetration, assault, and patient abuse. Defendants moved to dismiss the complaint as barred by the applicable statute of limitations. After analyzing Plaintiffs' claims, the Court concluded that Plaintiffs' cause of action accrued when the trial court dismissed the charges against Plaintiff Wilmoth pursuant to a nolle prosequi. Since this occurred more than two years before Plaintiffs filed their complaint, the Court found Plaintiffs' complaint time-barred.

Plaintiffs now ask the Court to reconsider this order and suggest that the Court improperly relied on state court decisions in deciding when their cause of action accrued.

11. LEGAL STANDARD

A motion for reconsideration is considered a motion to alter or amend judgment under Fed. R. Civ. P.59(e).Smith v. Hudson, 600 F.2d 60, 62-63 (6th Cir. 1979). Such a motion is extraordinary and sparingly granted. Plaskon Elec. Materials inc. v. Allied-Signal, Inc., 904 F. Supp. 644, 669 (N.D. Ohio 1995). A motion to amend or alter judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. Gencorp, inc. v. American int'l Underwriters, 178 F.3d 804, 834 (6th Cir. 1999). "it is not the function of a motion to reconsider either to renew arguments already considered and rejected by a court or ~to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue." McConocha v. Blue Cross & Blue Shield Mut. of Ohio, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996) (quoting In re August 1993 Regular Grand Jury, 854 F. Supp. 1403, 1408 (S.D. 2d. 1994)). When the "defendant views the law in a light contrary to that of this Court," its "proper recourse" is not by way of a motion for reconsideration "but appeal to the Sixth Circuit" Dana Corp. v. United States, 764 F. Supp. 482, 489 (N.D. Ohio 1991).

III. DISCUSSION

Plaintiffs seek reconsideration of the dismissal of their complaint because they believe the Court improperly relied on state law to decide the accrual date for the action. In deciding when Plaintiffs' cause of action accrued, the Court grappled with a novel factual scenario in which no binding nor persuasive federal authority existed. Specifically, the Court was called on to decide whether a nolle prosequi based on a witness refusal to testify constitutes a favorable termination for purposes of a malicious prosecution claim.

Lacking clear guidance from federal courts, the Court examined the Restatement of Torts and case law from state courts that had directly addressed the issue. The Court found persuasive the reasoning of the state courts that had concluded that the issuance of a nolle prosequi in such a situation was a favorable termination. Moreover, the Court concluded that the Restatement of Torts supported this decision. In the absence of clear direction from federal courts on the issue, the Court appropriately considered other sources in deciding the controversy before it.

IV. CONCLUSION:

Because the Plaintiffs have not shown adequate reason for the Court to alter or amend its order, the Court DENIES Plaintiffs' motion for reconsideration.

IT IS SO ORDERED.

Dated: April 29, 2004

No. 05-773

In The
Supreme Court of the United States

FRANKLIN WILMOTH AND MARY WILMOTH,
Petitioners,
v.
PORTAGE COUNTY, OHIO, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January, 2006

I. QUESTION PRESENTED FOR REVIEW

Whether the accrual date begins for an action under 42 U.S.C. §1983 when a nolle prosequi is entered after reversal of a conviction where there is no suggestion from the circumstances of the entry of the nolle prosequi that the defendant was in fact guilty, or whether, as Petitioner contends, the accrual date does not begin until there is a formal finding of innocence by the state court.

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II. STATEMENT OF THE CASE AND FACTS

On December 2, 2003, Petitioners Franklin Wilmoth and Mary Wilmoth filed the within lawsuit alleging, inter alia, that these Respondents acted in a manner contrary to law in obtaining his conviction for gross sexual imposition in state court proceedings on or about April 13, 1994, in Portage County, Ohio, in Case No. 93 CR 0041. (R.1, Complaint, ¶21)

On or about February 4, 2004, these Defendants-Petitioners filed a Motion to Dismiss on the sole basis that the Plaintiff's Complaint was time-barred as falling outside the two-year statute of limitations applicable to claims brought pursuant to 42 U.S.C. §1983.

After full briefing by the parties herein, the District Court entered its decision granting the motion to dismiss as to all parties on the basis of the statute of limitations. The judgment was entered on April 29, 2004. (R.35, 37, Opinion

of the District Court, Judgment Entry, and Order). The Petitioners filed a Notice of Appeal on May 12, 2004. (R.47) The Court of Appeals of the Sixth Circuit issued an Order on April 28, 2005, affirming the District Court's dismissal. The Petitioners sought a Rehearing En Banc which was denied on July 29, 2005.

The facts pertinent to this appeal relate to the issue on appeal, to wit, the statute of limitations. Petitioner Franklin Wilmoth was convicted of gross sexual imposition on April 13, 1994, in Portgage County, Ohio, Case No. 93 CR 0041. (R.1 Complaint, ¶21) His conviction was reversed on direct appeal by the state appellate court, Case No. 94 PA 0036, on June 12, 1995. (R.1 Complaint, ¶22)

Finally, on October 11, 2000, the county prosecutor filed a nolle prosequi, dismissing with prejudice the case against Franklin Wilmoth. (R.1 Complaint, ¶24; R.35 Opinion)

Petitioner-Appellant Franklin Wilmoth sought a certificate of wrongful incarceration which the Court of Common Pleas of Portage County granted on January 8, 2002. (R.1 Complaint, ¶6) Petitioner was subsequently compensated in the amount of $111,934.20 for his wrongful imprisonment pursuant to Ohio Revised Code Section 2743.48.

On December 2, 2003, Petitioner-Appellants filed the within lawsuit. Said filing was over three years after the aforementioned filing of the nolle prosequi.

III. SUMMARY OF ARGUMENT

All agree that the statute of limitations for Petitioners-Appellants' cause of action is two years. The issue is when does the statute of limitations begin to run. Obviously, as with any cause of action, it arises when all of the elements of the cause of action exist.

When an action asserts 42 U.S.C. Sec. 1983, federal courts look at the closest analogy in state law to determine when the statute of limitations begins to run. In this case, the closest analogy is the tort of malicious criminal prosecution.

In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct 2364 (1994), this Court held that a 42 U.S.C. §1983 cause of action does not accrue until the plaintiff has a favorable termination of the criminal proceeding. Of course, accrual of the cause of action starts the statute of limitations.

The overwhelming weight of authority holds that state law causes of action for malicious criminal prosecution accrue - at the latest - when criminal charges are dismissed against the plaintiff. 52 AM JUR. 3D Malicious Prosecution §35.

The overriding concern of federal courts is the strong judicial policy to avoid the creation of two conflicting resolutions arising out of the same or identical transaction.

Heck, 114 S.Ct. at 2371-72. The federal courts do not want to permit a collateral attack in a federal civil suit by a plaintiff that would conflict with a successful prosecution in a state criminal proceeding. *Id.*

Accordingly, the state criminal proceeding must be concluded in a manner favorable to the plaintiff before he can begin a civil suit under §1983. The Appellants in this case are trying to construe the "favorable" element to mean that the state court must make a positive finding of wrongful incarceration before a §1983 claim can be brought. But that would impose an unnecessary burden on a plaintiff seeking to file a §1983 claim.

The concern of avoiding conflicting judgments in state and federal courts does not require a positive finding of wrongful incarceration but merely requires the dismissal of charges, acquittal, or reversal of conviction on direct appeal.

Appellant Franklin Wilmoth obtained a nolle prosequi, i.e, a final dismissal of charges against him, more than two years before he filed suit. Consequently, his claim is time barred.

IV. ARGUMENT

Petitioners-Appellants' Claims Under 42 U.S.C. §1983 Are Barred By the Statute of Limitations

The issue herein is when did Petitioners' cause of action accrue. All agree that it accrued when all the elements of the §1983 action are met. And the parties agree that the holding in *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), is dispositive of when a cause of action under §1983 accrues.

This Court therein stated:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a

> §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. §2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under §1983.

Id., 114 S. Ct. at 2372. See also, *Smith v. Holtz*, 87 F.3d 108, 111 (3d Cir. 1996) (same for §1983 malicious prosecution action); *Washington v. Summerville*, 127 F.3d 552, 558-59 (7th Cir.1997) (same for §1983 malicious prosecution action); *Trussel v. Gen. Motors Corp.*, 559 N.E.2d 732, syllabus (Ohio 1990) (same under Ohio law). Thus, Petitioners' federal malicious prosecution claim necessarily implies that Franklin Wilmoth's conviction for gross sexual imposition and patient abuse were invalid. Under the rationale of *Heck*, the claims were not cognizable until Wilmoth secured a favorable termination of the criminal proceeding.